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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 ARISTA RECORDS LLC, a Delaware
11 limited liability company; ATLANTIC
12 RECORDING CORPORATION, a
13 Delaware corporation; BMG MUSIC, a
14 New York general partnership; CAPITOL
15 RECORDS, LLC, a Delaware limited
16 liability company; CAROLINE
17 RECORDS, INC., a New York
18 corporation; ELEKTRA
19 ENTERTAINMENT GROUP INC., a
20 Delaware corporation, EMI CHRISTIAN
21 MUSIC GROUP, INC., a California
corporation; LAFACE RECORDS LLC, a
Delaware limited liability company;
PRIORITY RECORDS, LLC, a Delaware
limited liability company; SONY BMG
MUSIC ENTERTAINMENT, a Delaware
partnership; UMG RECORDINGS, INC.,
a Delaware corporation; VIRGIN
RECORDS AMERICA, INC., a
California corporation; WARNER BROS.
RECORDS INC., a Delaware corporation;
ZOMBA RECORDINGS, LLC, a
Delaware limited liability company,

22 || Plaintiffs,

23 || v.

24 MYXER INC., f/k/a mVISIBLE
25 TECHNOLOGIES, INC.; MICHAEL
26 "MYK" WILLIS, an individual; SCOTT
KINNEAR, an individual, and RON
HARRIS, an individual.

27 || Defendants.

Case No. CV 08-03935 GAF (JCx)

The Honorable Gary A. Feess

**PLAINTIFFS' MEMORANDUM RE
ISSUES TO BE ADDRESSED AT
OCTOBER 30, 2009 DISCOVERY
HEARING**

Date: October 30, 2009
Time: 3:00 p.m.
Ctrm: 740

Disc. Cutoff: November 16, 2009
Pretrial Conf.: January 4, 2010
Trial Date: February 2, 2010

Preliminary Statement

2 Plaintiffs file this brief out of an abundance of caution, and the need for the
3 Court to consider it depends (at least in large part) on the outcome of Plaintiffs'
4 motion for evidentiary sanctions currently set for hearing on October 23. The
5 document requests, interrogatories, and requests for admission at issue on this
6 motion were propounded in July and August, in a "belt-and-suspenders" effort to
7 ensure that Myxer could not evade production of certain specific documents and
8 information already responsive to Plaintiffs' first set of document requests, but as
9 yet unproduced. When this Court ordered Myxer on July 31 to fully and completely
10 comply with the Court's April 28 Order, Plaintiffs anticipated receiving such
11 documents and information by mid-August, as ordered by the Court, but as the
12 Court is aware from the Motion for Evidentiary Sanctions, this did not occur. The
13 remedies sought by Plaintiffs in the motion for evidentiary sanctions, if granted by
14 the Court, would largely render moot the discovery requests presented on this
15 Memorandum, but as discovery is nearing its end in this case, and Plaintiffs do not
16 know the outcome of the Motion for Evidentiary Sanctions, Plaintiffs have no
17 choice but to present these issues to the Court at this time. Depending on the
18 outcome of the Court's ruling on the Motion for Evidentiary Sanctions, the issues
19 presented herein can be narrowed or eliminated.

20 In the event that the Court denies Plaintiffs' Motion for Evidentiary Sanctions
21 in whole or in part, Plaintiffs request that Myxer be ordered to respond fully and
22 completely to the specific discovery requests identified below. Myxer has refused
23 to provide simple yet undeniably relevant discovery by providing boilerplate,
24 nonsensical objections and evasive responses to Plaintiffs' requests, including
25 Plaintiffs' Fourth Set of Requests for Production of Documents and Tangible
26 Things; Fifth Set of Requests for Production of Documents and Tangible Things;
27 Plaintiffs' Second Set of Requests for Admission; and plaintiff Caroline Records'

1 Special Interrogatories.¹ Myxer should be ordered to produce documents in
 2 response to the Fourth and Fifth Set of Requests for Production and to provide full,
 3 complete, substantive, and non-evasive responses to the Requests for Admission and
 4 Interrogatories.

5 **Argument**

6 **A. Myxer Should Be Compelled to Produce Documents in Response to
 7 Plaintiffs' Fourth Set of Requests for Production of Documents**

8 On July 24, 2008, Plaintiffs propounded their Fourth Set of Requests for
 9 Production [Nos. 81-103] (the "Fourth Set"). Declaration of Donald A. Miller
 10 ("Miller Decl.") ¶ 2, Ex A. The Fourth Set included the following requests:

11 **Request No. 82:** All DOCUMENTS that constitute, embody,
 12 reflect, or refer to the "table of downloads" referred to on page 6 of
 13 "Myxer's Inc.'s Memorandum re Issues to be Addressed at July 31,
 14 2009 Discovery Hearing," dated July 22, 2009.

15 **Request No. 83:** All DOCUMENTS that constitute, embody,
 16 reflect, or refer to the information on the "full audit list" – regardless of
 17 the document's formal or actual name or the manner in which
 18 individuals commonly refer to it – as Myk Willis used that term in his
 19 August 1, 2007, email to Gina Balcom, Steve Spiro, and Scott Kinnear
 20 number-stamped MYX 2053310.

21 **Request No. 84:** All DOCUMENTS that constitute, embody,
 22 reflect, or refer to data collected as a result of MYXER's efforts to
 23 "keep[] track of what content a person downloads," as Myk Willis
 24 stated in his August 1, 2007, email to Gina Balcom, Steve Spiro, and
 25 Scott Kinnear number-stamped MYX 2053310.

26 ¹ Caroline Records has since dismissed its claims, but Fed. R. Civ. P. 37 does
 27 not restrict discovery motions to interrogatories propounded by the party making the
 28 motion. See Fed. R. Civ. P. 37(a)(3)(B)(iii) (discovery motion may be made if "a
 party fails to answer an interrogatory submitted under Rule 33"). By contrast, when
 Congress chose to impose such a limitation, it did so explicitly, such as in Rule 36
 concerning requests for admission. See Fed. R. Civ. P. 36(a)(6) ("***The requesting
 party*** may move to determine the sufficiency of an answer or objection.") (emphasis
 added).

Request No. 85: All DOCUMENTS that constitute, embody, reflect, or refer to the following “Tables” or reports (from their inception to present, including all versions and all columns in each version) referred to by Wayne Kemble in his July 17, 2007 email to “dev” sent at or about 6:05 p.m.:

- (a) “SongTable”
- (b) “ProfileTable” (including all columns)
- (c) “ContentTable”
- (d) “UploadTable”
- (e) “RingtoneTable”
- (f) “UserTable”
- (g) “RatingTable”
- (h) “TagTable”
- (i) “CommentTable”
- (j) “AdministratorTable”
- (k) “UnknownUserAgentTable”
- (l) “AdWapTable”
- (m) “EmailBlackListTable”
- (n) “ProductSaleTable”
- (o) “SegmentTable”
- (p) “VerificationTable”
- (q) “CarrierTable”
- (r) “FanTable”
- (s) “SmsAuditTable”
- (t) “DownloadTable”
- (u) “HotTopicTable”

Request No. 86: All DOCUMENTS that constitute, embody, reflect, or refer to the “SongRecord” (from its inception to present, including all versions) referred to by Scott Clark in his May 28, 2008 email to Chris Wilson sent at or about 18:07:04 EDT.

Request No. 87: All DOCUMENTS that constitute, embody, reflect or evidence any ringtone that has ever been downloaded or sent to a cell phone from or by use of any website MYXER owns, operates or controls.

Request No. 88: All DOCUMENTS that reflect any of the following information related to any ringtone that has ever been downloaded or sent to a cell phone from or by use of any website MYXER owns, operates or controls: (1) the name of the ringtone file; (2) the tags associated with the ringtone file; (3) any data associated

1 with the ringtone file that enables a person to search for the ringtone by
 2 use of MYXER's or any other search engine; (4) the size of the
 3 ringtone file; (5) the URL where the file or ringtone is or was located;
 4 (6) the name of the song; (7) the name of the artist that performed on
 5 the song; (8) the username and/or identity of the Myxer user who
 6 downloaded or sent the song; (9) the date the ringtone was downloaded
 7 or sent to a cell phone; (10) the identity of the device to which the
 8 ringtone was downloaded or sent; and (11) the username and/or
 9 identity of the Myxer user who posted or uploaded the song to the
 10 website MYXER owns, operates or controls.

11 **Request No. 89:** All DOCUMENTS that embody or reflect any
 12 of the following information related to any ringtone embodying any
 13 sound recording (or any portion thereof) owned by any of the plaintiffs
 14 that has ever been downloaded or sent to a cell phone from or by use of
 15 any website MYXER owns, operates or controls: (1) the name of the
 16 ringtone file; (2) the tags associated with the ringtone file; (3) any data
 17 associated with the ringtone file that enables a person to search for the
 18 ringtone by use of MYXER's or any other search engine; (4) the size of
 19 the ringtone file; (5) the URL where the file or ringtone is or was
 20 located; (6) the name of the song; (7) the name of the artist that
 21 performed on the song; (8) the username and/or identity of the Myxer
 22 user who downloaded or sent the song; (9) the date the ringtone was
 23 downloaded or sent to a cell phone; (10) the identity of the device to
 24 which the ringtone was downloaded or sent; and (11) the username
 25 and/or identity of the Myxer user who posted or uploaded the song to
 26 the website MYXER owns, operates or controls.

27 **Request No. 90:** All DOCUMENTS that embody or reflect any
 28 of the following information related to any ringtone embodying any
 sound recording (or any portion thereof) at issue in this case that has
 ever been downloaded or sent to a cell phone from or by use of any
 website MYXER owns, operates or controls: (1) the name of the
 ringtone file; (2) the tags associated with the ringtone file; (3) any data
 associated with the ringtone file that enables a person to search for the
 ringtone by use of MYXER's or any other search engine; (4) the size of
 the ringtone file; (5) the URL where the file or ringtone is or was
 located; (6) the name of the song; (7) the name of the artist that
 performed on the song; (8) the username and/or identity of the Myxer
 user who downloaded or sent the song; (9) the date the ringtone was
 downloaded or sent to a cell phone; (10) the identity of the device to
 which the ringtone was downloaded or sent; and (11) the username

1 and/or identity of the Myxer user who posted or uploaded the song to
 2 the website MYXER owns, operates or controls.

3 **Request No. 91:** All DOCUMENTS that embody or reflect any
 4 of the following information related to any ringtone of any sound
 5 recording (or any portion thereof) listed in Schedule A of the
 6 Complaint that has ever been downloaded or sent to a cell phone from
 7 or by use of any website MYXER owns, operates or controls: (1) the
 8 name of the ringtone file; (2) the tags associated with the ringtone file;
 9 (3) any data associated with the ringtone file that enables a person to
 10 search for the ringtone by use of MYXER's or any other search engine;
 11 (4) the size of the ringtone file; (5) the URL where the file or ringtone
 12 is or was located; (6) the name of the song; (7) the name of the artist
 13 that performed on the song; (8) the username and/or identity of the
 14 Myxer user who downloaded or sent the song; (9) the date the ringtone
 15 was downloaded or sent to a cell phone; (10) the identity of the device
 16 to which the ringtone was downloaded or sent; and (11) the username
 17 and/or identity of the Myxer user who posted or uploaded the song to
 18 the website MYXER owns, operates or controls.

19 **Request No. 92:** All DOCUMENTS that constitute, embody,
 20 reflect, or refer to any videos uploaded by MYXER to
 21 www.youtube.com, including but not limited to the videos themselves,
 22 raw footage or material, edited footage or material, unused footage or
 23 material, and outtakes, and DOCUMENTS reflecting any discussion of
 24 such videos.

25 **Request No. 93:** All DOCUMENTS that constitute, embody, or
 26 reflect any data or information contained at any time on any version or
 27 draft of the Excel spreadsheet MYXER produced in this lawsuit on or
 28 about April 5, 2009, and number-stamped MYX 007, which was
 removed, hidden, deleted, or otherwise made inaccessible to Plaintiffs
 prior to its production of MYX 007 on or about April 5, 2009.

29 **Request No. 94:** All DOCUMENTS that constitute, embody, or
 30 reflect the column headings for the Excel spreadsheet MYXER
 31 produced in this lawsuit on or about April 5, 2009, and number-
 32 stamped MYX 007.

33 Id. Myxer responded to each of these document requests with boilerplate,
 34 obstructive, and meritless objections. Id. ¶ 2, Ex. B. As an example, consider the
 35 following: In the Court's Order dated July 17 (Docket No. 74), the Court required

1 Myxer's counsel to inquire of Myxer about a document requested by Plaintiffs in a
 2 prior discovery brief, called the "full audit list," referenced by CEO Myk Willis in
 3 an email. Id., Ex. H ("We've been keeping a ***full audit list*** of every download since
 4 the beginning of time . . .") (emphasis added).² In response to the Court's Order,
 5 Myxer stated evasively, "No documents exists entitled 'Full Audit List.' There is a
 6 table of downloads as titled by the user or the artist. The actual document does not
 7 appear to be responsive to any request, however the titles on the table are
 8 encompassed in other documents which have been produced." Myxer's Inc.'s
 9 Memo re Issues to be Addressed at July 31, 2009 Discovery Hearing, dated July 22,
 10 2009 [Docket No. 161] at 6. Based on this representation, Plaintiffs propounded
 11 Request No. 82, ***quoting exactly the language from Myxer's July 22 brief:***

12 All DOCUMENTS that constitute, embody, reflect, or refer to the
 13 "table of downloads" referred to on page 6 of "Myxer's Inc.'s
 14 Memorandum re Issues to be Addressed at July 31, 2009 Discovery
 15 Hearing," dated July 22, 2009.

16 Miller Decl., Ex. A (Request No. 82). Yet, Myxer still responded with boilerplate
 17 objections, including, incredibly, "on the grounds that it is vague and ambiguous."
 18 Id., Ex. B at 7. Similarly, Plaintiffs also propounded these requests, this time
 19 quoting exactly from the Myk Willis email (see fn. 2):

20 All DOCUMENTS that constitute, embody, reflect, or refer to the
 21 information on the "full audit list" – regardless of the document's
 22 formal or actual name or the manner in which individuals
 23 commonly refer to it – as Myk Willis used that term in his August
 24 1, 2007, email to Gina Balcom, Steve Spiro, and Scott Kinnear
 25 number-stamped MYX 2053310.

26 ² The Myk Willis email states, in pertinent part: "We're going to have to be
 27 creative to get truly valuable behavioral targeting. For example, ***keeping track of***
 28 ***what content a person downloads*** is going to be far more valuable than forcing
 29 them to answer the question 'what is your favorite music genre?' in the long run."
 30 Miller Decl., Ex. H (emphasis added). We've been keeping a full audit list every
 31 download since the beginning of time to aid in this."

1 All DOCUMENTS that constitute, embody, reflect, or refer to data
 2 collected as a result of MYXER's efforts to "keep[] track of what
 3 content a person downloads," as Myk Willis stated in his August 1,
 4 2007, email to Gina Balcom, Steve Spiro, and Scott Kinnear
 5 number-stamped MYX 2053310.

6 Id., Ex. A (Request Nos. 83 and 84). Again, Myxer responded with boilerplate
 7 objections and refused to produce documents.

8 As the Court is aware in connection with Plaintiffs' evidentiary sanctions
 9 motion, the documents responsive to Plaintiffs' fourth set of requests for production
 10 are also responsive to Plaintiffs' first set of requests for production, and Myxer
 11 should have produced such documents long ago as required by this Court's April 28
 12 and July 31 Orders. However, if, for whatever reason, the Court finds that these
 13 documents were somehow not encompassed within and responsive to the first set,
 14 then the Court should now compel Myxer's production of these documents. They
 15 are clearly relevant to Plaintiffs' claims that Myxer has reproduced and downloaded,
 16 and facilitated the download of, Plaintiffs' copyrighted sound recordings in violation
 17 of Plaintiffs' exclusive distribution right, 17 U.S.C. § 106(3); that Myxer has actual
 18 or constructive knowledge of Plaintiffs' works and its users' activities, which is
 19 relevant to the doctrine of contributory copyright infringement and Myxer's
 20 disentitlement to DMCA safe harbor; and that Myxer has induced infringement
 21 through its advertisements, promotional materials, and other communications with
 22 users or potential users of its website.

23 **B. Myxer Should Be Compelled to Produce Documents in Response to**
 24 **Plaintiffs' Fifth Set of Requests for Production of Documents**

25 Myxer's responses to Plaintiffs' Fifth Set of Requests for Production [104-
 26 112] were just as improper. In Request No. 104, Plaintiffs requested the (a)
 27 "Content Take Down Table," (b) Producer Table, (c) the "Segment Table," (d) the
 28 "label BlackList," (e) the Myxer "internal Wiki," (f) "Downloads by producer," (g)
 29 the "RingtoneAuditTable," (h) the SmsKeywordTable," and (i) the Download

1 Success Summary.” Id., Ex. C. For each of the items requested in Request No. 104,
 2 Plaintiffs also referenced – and even attached to the requests – a document produced
 3 by Myxer that discusses and demonstrates the relevance of the particular item
 4 requested. See, e.g., id., Exhibit 1 [Myxer internal email re “ContentTakeDown
 5 Table” – Request No. 104(a): appears to contain items taken down as a result of a
 6 DMCA request]; Exhibit 4 [Myxer internal email re “label BlackList” – Request No.
 7 104(d): “When an artist shares content, we check if the label that is returned from
 8 Audible [Magic] is in our ‘labelBlackList’”]; Exhibit 8 [Myxer internal email re
 9 “SmsKeywordTable” – Request No. 104(h): appears to contain key words that
 10 facilitate ads sent to cell phone, via SMS messaging, during the downloading
 11 process]. Myxer responded with boilerplate objections. Id., Ex. D.

12 Similarly, Myxer responded with boilerplate objections to the following
 13 requests within the Fifth Set: No. 105 (“the 5,000 ringtones files most frequently
 14 downloaded”), even though Bill Madden testified that such a document could be
 15 produced (Madden Depo. [Miller Decl., Ex. G] at 265:23-266:4); No. 106 (Myxer’s
 16 “‘Stay Down List’ referred to by William Madden in his July 28 deposition”); No.
 17 107 (“any report or data generated from YOUR use of Audible Magic technology”);
 18 No. 110 (“All DOCUMENTS that reflect or evidence all of the ringtones (identified
 19 by Content ID) that have been downloaded by Myk Willis from any website
 20 operated or controlled by YOU.”); No. 111 (“All DOCUMENTS that reflect or
 21 evidence all of the ringtones (identified by Content ID) that have been downloaded
 22 by Scott Kinnear from any website operated or controlled by YOU.”); No. 112
 23 (“YOUR ‘Production Database’ – referred to by William Madden in his July 28,
 24 2009, deposition (the pertinent excerpt of which is attached hereto as Exhibit 11) –
 25 in native format.”). Miller Decl., Ex. C. Again, each request was met with
 26 boilerplate objections, and Myxer has refused to produce documents responsive the
 27 requests. Id., Ex. D. Myxer should be compelled to do so. Request No. 107 is of
 28 particular importance, because the reports that Myxer received from Audible Magic

1 would expressly inform Myxer that Plaintiffs own the copyrights in their works and
2 that Plaintiffs do not authorize Myxer to make them available and demand that they
3 be blocked – critically important evidence of Myxer’s knowledge of infringement.

4 **C. Myxer Should Be Compelled To Provide Full, Complete, and Non-**
5 **Evasive Responses to Plaintiffs’ Requests for Admission and**
6 **Corresponding Interrogatories**

7 From March to May 2009, Myxer produced six hard drives on six separate
8 occasions containing collectively over 1.4 million music files. Miller Decl ¶ 3.
9 Along with the hard drives, Myxer produced an Excel file, called the “Myxer Song
10 Data Spreadsheet” (also referred to as the “Song List”), presumably containing data
11 regarding the 1.4 million music files. Id. Plaintiffs’ Requests for Admissions Nos.
12 309, 310, and 311 seek confirmation of precisely what these materials represent.
13 Myxer responded evasively. For example, in RFA No. 309, Plaintiffs requested that
14 Myxer “[a]dmit that the hard drives produced by MYXER in this lawsuit and
15 number stamped MYX004, MYX005, MYX006, MYX008, MYX011 and
16 MYX012, *were copied from hard drives owned or controlled by MYXER* between
17 March and May 2009, inclusive.” Id., Ex. E. (emphasis added). Myxer responded:
18 “Myxer admits that it produced hard drives number stamped MYX004, MYX005,
19 MYX006, MYX008, MYX011 and MYX012 between March and May 2009.” Id.
20 Obviously, Plaintiffs already knew that; this response is inherently evasive. Myxer
21 responded *exactly* the same way to RFA No. 310 and RFA No. 311, in which
22 Plaintiffs requested further information regarding the hard drives and the Song Data
23 Spreadsheet, as Myxer did in RFA No. 309 – admitting only that the hard drives
24 were produced between March and May 2009. Id.

25 In RFA Nos. 312, 313, and 314, Plaintiffs sought other information relating to
26 the Hard Drives and Song List. Again, Myxer’s response – which was the same for
27 each request – was evasive. For example, in RFA No. 313, Plaintiffs requested:

28 Admit that MYXER has not produced in this lawsuit any documents
that evidence or reflect when any of the MP3 files contained on the

hard drives number stamped MYX004, MYX005, MYX006, MYX008, MYX011 and MYX012 was first copied to a computer server owned or controlled by MYXER and made accessible to the public through any website owned or controlled by MYXER.

4 Id. Myxer responded to RFA No. 313, and to RFA 312 and 314, exactly the same:
5 “Myxer is unable to respond to this request as drafted.” Id. Likewise, in the
6 interrogatories corresponding to RFA Nos. 309 to 314 (i.e., Plaintiff Caroline
7 Records Interrogatory Nos. 4 to 9) – e.g., “If your response to Request for
8 Admission No. [309-314] is anything other than an unqualified admission, state all
9 facts that support your response” – Myxer provided only boilerplate objections to
10 every interrogatory. Id., Ex. F.

11 Finally, Plaintiff Caroline Records propounded three interrogatories [Nos. 1-
12 3] requesting information related to the MP3 files on the hard drives that Myxer
13 produced and the data contained on the Song List (Nos. 1-3). Id.³ Again, each
14 interrogatory was met with boilerplate objections.

Conclusion

16 This Court should compel Myxer to respond to Plaintiffs' Fourth Set of
17 Requests for Production and Plaintiffs' Fifth Set of Requests for Production,
18 Plaintiffs' Requests for Admission, and the Interrogatories.

19 Dated: October 21, 2009 LOEB & LOEB LLP

By:/s/ Jeffrey D. Goldman

Jeffrey D. Goldman
Attorneys for Plaintiffs

27 |
28 |³ For example, the Excel file does not contain any column headings, and is
missing hundreds of thousands of rows of data. Miller Decl. ¶ 3.